

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
PAUL LEWIS ASHENFELTER and)	CASE NO. 03-36262 HCD
PAMELA ANNE ASHENFELTER,)	CHAPTER 13
)	
DEBTORS.)	

Appearances:

Loraine Troyer, Esq., attorney for debtors, 121 North Third Street, Goshen, Indiana 46526;

Debra L. Miller, Esq., Standing Chapter 13 Trustee, 100 East Wayne Street, P.O. Box 11550, South Bend, Indiana 46634; and

Thomas E. Panowicz, Esq., Staff Attorney, Standing Chapter 13 Trustee, 100 East Wayne Street, P.O. Box 11550, South Bend, Indiana 46634.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 31, 2005.

Before the court are the Chapter 13 Trustee's Final Report and Account, filed on July 29, 2004, by Debra L. Miller, Esq., Trustee in this chapter 13 case, and the Objection thereto, filed on August 2, 2004, by the debtors Paul Lewis Ashenfelter and Pamela Anne Ashenfelter, by counsel. The debtors requested that the Trustee's Final Report not be allowed and that the Trustee be ordered to recover the funds already distributed to creditors in order to make full payment of attorney fees to counsel for the debtors. A hearing on the matter was held on September 23, 2004. The court directed the parties to file briefs. After the period for filing briefs and responses had expired, the court took the matter under advisement.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding

within the meaning of § 157(b)(2)(O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The facts in this case are not in dispute. The debtors filed their chapter 13 petition on October 31, 2003, and filed their plan on November 17, 2003. The chapter 13 plan was confirmed on January 20, 2004, by regular confirmation order. The court's Order of confirmation allowed debtors' counsel an attorney fee of \$2,500, of which \$2,235 was to be paid from the estate.¹ Pursuant to that Order, the Trustee paid the debtors' attorney the first \$1,000 on February 1, 2004, and disbursed \$100.00 per month in March, April, and May 2004. The debtors filed a voluntary motion to dismiss their case on May 25, 2004, and the court granted the dismissal on May 27, 2004.² At the time of the dismissal, the Trustee had paid the attorney for the debtors \$1,300; a balance of \$935 in fees remained. The Trustee held \$4,689.47 that was available for distribution under the confirmed plan.

¹ The Order of January 20, 2004, confirming the debtors' chapter 13 plan, states:

The court further allows the debtors' attorney a fee of \$2,500 as an administrative expense under 11 U.S.C. § 503(b)(1)(A), of which \$2,235 is due and payable from the estate. As long as the debtors remain up-to-date on payments to the Trustee pursuant to 11 U.S.C. § 1322(b)(5), the court directs the Trustee to pay the first \$1000 of funds received immediately and \$100 per month thereafter to the debtors' attorney until the administrative expense is paid in full.

² The Dismissal Order contains the following pertinent provisions:

...

3. Any entity wishing to file a request for payment of an administrative expense under 11 U.S.C. § 503(b) shall file the request within 14 days from the date of this order.

4. The chapter 13 trustee shall distribute all funds on hand in accordance with 11 U.S.C. § 1326(b) and file a chapter 13 final report and account as soon as practicable.

...

R. 39, Order of May 27, 2004.

The Order of dismissal required administrative claimants to file a request for payment within 14 days. The debtors' attorney did not file a request for an administrative expense under § 503(b).

The court's dismissal Order directed the chapter 13 Trustee to disburse the funds on hand in accordance with 11 U.S.C. § 1326(b).³ The Trustee disbursed to the debtors' counsel \$200 (two \$100 monthly payments in June and July 2004) and distributed the remaining funds, \$4,489.47, to creditors. The Trustee did not pay the attorney the balance, \$735, before making the distribution to creditors. On that ground, debtors' counsel objected to the Trustee's Final Report. It is her position that attorney fees were granted under the debtors' chapter 13 Plan and should be paid in full as an administrative expense by the Trustee before any distribution is made to creditors. It is the Trustee's position that the funds on hand must be distributed pursuant to the terms of the confirmed plan and that the debtors' counsel should be paid her allotted portion along with the other creditors.

Discussion

The issue posed by the parties is whether the Trustee, in disbursing funds after this confirmed chapter 13 case was dismissed, should have paid the debtors' attorney the entire balance of her attorney fee, as an administrative expense, before any distribution to creditors.

The effect of dismissal of a case is set forth in 11 U.S.C. § 349. Generally, a case dismissed before discharge is dismissed without prejudice. *See* § 349(a). The dismissal reinstates pre-bankruptcy proceedings and custodianships, voided liens and avoided transfers. *See* § 349(b)(1). It vacates orders, judgments, and transfers

³ 11 U.S.C. § 1326(b) states:

Before or at the time of each payment to creditors under the plan, there shall be paid –

(1) any unpaid claim of the kind specified in section 507(a)(1) of this title [which are administrative expenses allowed under section 503(b) and given priority treatment]; and

(2) if a standing trustee . . . is serving in this case, the percentage fee fixed for such standing trustee

ordered as a result of the avoidance of a transfer. *See* § 349(b)(2). Finally, the dismissal “revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case.” § 349(b)(3). “The objective of section 349(b) is to undo the title 11 case, insofar as is practicable, and to restore all property rights to the position they occupied at the beginning of such case.” 3 *Collier on Bankruptcy*, ¶ 349.01[2] at 349-3 (Resnick, Alan N. & Henry J. Sommer, Eds.-in-Chief, 15th ed. rev’d 2004). Both subsections (a) and (b) provide that, when there is cause, the court has discretion to order a different result from the one provided in the statute. However, by its terms § 349, and in particular the revesting requirement, “changes the rights of all parties at dismissal.” Keith M. Lundin, 4 *Chapter 13 Bankruptcy*, 3d Ed. § 338.1 at 338-1 (2000 and Supp. 2004).

As Judge Lundin stated in his authoritative treatise on chapter 13 bankruptcy, the other provision in the Bankruptcy Code that is relevant at dismissal is § 1326(a)(2). *See id.* at 338-5. It states:

A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

11 U.S.C. § 1326(a)(2). Under this subsection, after a plan is confirmed, the trustee is required to collect the plan payments from the debtor and to distribute the payments according to the plan’s terms. *See* §§ 1302, 704. If the case is dismissed, however, the trustee has in his possession funds which were being collected on a regular basis, usually in the form of wage deductions. This provision makes clear the procedure a trustee must follow in disbursing those funds when a case is dismissed before the plan is confirmed: The trustee is required to return payments in his or her possession to the debtor “after deducting any unpaid claim allowed under section 503(b),” which are administrative expenses, including attorney compensation and reimbursement approved by the court. But if a case is dismissed after the plan is confirmed, must the trustee distribute the payments held in his trust fund in accordance with the plan, as § 1326(a)(2) suggests, or does the property revert in the debtor (who most likely was the entity in which the property was vested before the bankruptcy), as § 349(b)(3) provides?

When this court grants dismissal of a debtor's case pursuant to § 1307(b) (after determining that the case had not been converted previously from another chapter of the Bankruptcy Code), it follows the procedure standardly used by bankruptcy courts in this district and probably across the nation: It directs anyone seeking an administrative expense payment to file a request within 14 days, and it orders the trustee to terminate wage deduction orders and to disburse all funds on hand in accordance with § 1326(b). The court's Order of dismissal also requires the trustee to submit a final report and account. *See* n.2 *supra*.

The question – to which entity or entities the trustee distributes the accumulated funds at dismissal – is a thorny one. As Judge Lundin succinctly stated it in his treatise on chapter 13 bankruptcies, “If a plan was confirmed, the requirement in § 1326(a)(2) that the trustee distribute any payments received from the debtor in accordance with the plan collides at dismissal with the reversion of property of the estate under § 349(b)(3).” Lundin, 4 *Chapter 13 Bankruptcy*, 3d Ed. § 338.1 at 338-11.

A few courts have addressed the issue. The Ninth Circuit Court of Appeals, in *Nash v. Kester* (*In re Nash*), 765 F.2d 1410 (9th Cir. 1985), held that the debtors' dismissal of their chapter 13 case “effectively vacated” their confirmed plan. *Id.* at 1413. It concluded that funds in the possession of the chapter 13 trustee, whether received before or after dismissal, belonged to the debtors upon dismissal and should not have been distributed as provided by the confirmed plan. *See id.* at 1414. In a recent opinion by the Bankruptcy Appellate Panel of the Ninth Circuit, *Nash* was upheld as the continued authority in the Ninth Circuit. *See Cohen v. Tran* (*In re Tran*), 309 B.R. 330, 335 (9th Cir. B.A.P. 2004). The Bankruptcy Appellate Panel concluded that “§ 1326(a)(2) was not intended to address the disposition of funds received by a chapter 13 trustee after confirmation.” *Id.* It upheld the bankruptcy court's ruling that the refinance proceeds remitted to the trustee before dismissal reverted in the debtor upon dismissal. *See id.* at 338; *see also In re Slaughter*, 141 B.R. 661 (Bankr. N.D. Ill. 1992) (following *Nash*).

A decision that disagreed with the Ninth Circuit's analysis was *In re Parrish*, 275 B.R. 424 (Bankr. D.D.C. 2002). It distinguished *Nash* on the ground that the bankruptcy law had changed after 1985 and that,

under the present Code, § 1326(a)(2) obligated the trustee to make distributions in accordance with the provisions of a confirmed plan.⁴ Although dismissal implicitly terminated the debtor's obligation to make future payments under the plan, stated the court, "nothing in the structure of the Bankruptcy Code's provisions suggests that dismissal undoes the confirmed plan with respect to past payments."⁵ *Id.* at 433 (emphasis added). It concluded that the funds held by the trustee at dismissal of a confirmed case were to be distributed according to the plan. Judge Lundin commented that "this outcome [in *Parrish*] elevates the requirement for distribution in § 1326(a)(2) over the termination of the Chapter 13 trustee in § 349(b), with a tip of the hat to § 349, which does not explicitly vacate the confirmation order." Lundin, 4 *Chapter 13 Bankruptcy*, 3d Ed. § 338.1 at 338-3.

One chapter 13 case focused on the issue presently before this court, the payment of attorney fees after dismissal. In *In re Lampman*, 276 B.R. 182 (Bankr. W.D. Tex. 2002), the debtors had dismissed their chapter 13 case voluntarily after their plan had been confirmed. They then sought to pay their attorney out of the funds remaining in the possession of the chapter 13 trustee for distribution. The court recognized that the revesting provision in § 349 would place the trustee's funds in the hands of the debtors. It also acknowledged

⁴ The bankruptcy court, in *Parrish*, found that § 349(b) and § 1326(a)(2), when read together, intended that property be returned to the debtor "subject to whatever restrictions § 1326(a)(2) imposes," and concluded that "§ 349(b) ought not be construed as terminating, at the moment of dismissal, the command of § 1326(a)(2) that the trustee distribute funds held under the confirmed plan in accordance with the plan." *Id.* at 426-27.

⁵ The Bankruptcy Court reasoned in *Parrish*:

The court disagrees with the Ninth Circuit's conclusion that a dismissal order effectively vacates an order of confirmation as to funds already paid under a confirmed plan. According to *Nash*, the dismissal would have a retroactive, rather than merely a prospective, effect on the plan. Allowing this retroactive effect could theoretically require the creditors to return all payments received under the plan to the debtor. Moreover, if dismissal vacated the confirmation order as to past plan payments, creditors could rightfully require daily distributions of funds held by the trustee under a confirmed plan, an administrative nightmare that Congress could not have intended. The debtor should not have both the benefit of creditors' enforced collection rights having been stayed by reason of a confirmed plan, and the right to receive undisbursed plan funds on dismissal. Congress could not have intended such an inequitable result. The plan payments (and the creditors' right to receive them under the confirmed plan's terms) were the price of the debtor's obtaining a stay of collection by way of the confirmed plan. Dismissal does not free the debtor of that price.

In re Parrish, 275 B.R. at 433 (citations omitted).

that administrative expenses were allowed under § 1326(a)(2), and stated: “Courts have construed this provision, in the context of a voluntary dismissal, to mean that the chapter 13 trustee is obligated to satisfy allowed administrative claims out of funds on hand *before* returning the remainder to the debtor.” *Id.* at 184. The court found that administrative expenses should be paid whether the plan was or was not confirmed and concluded:

[T]he court here holds that, on motion of the debtor requesting payment of attorney fees previously allowed in a chapter 13 case, the court will order that such fees be deducted from the funds on hand and paid over to the attorney in question. Any balance will then be returned to the debtor. Any motion must be signed by the debtors as well as by the attorney filing the pleading. The trustee will not be obligated to disburse any greater amount of fees than has already been allowed to the attorneys.

Id. at 184-85.

This court agrees with Judge Lundin’s comment that the result of this decision was reasonable. *See* Lundin, *Chapter 13 Bankruptcy*, § 338.1 at 338-3 (“Not unreasonably, the bankruptcy court in *Lampman* extended the rights of debtor’s counsel to include payment of fees from funds held by the Chapter 13 trustee at dismissal after confirmation.”). It finds *Lampman*’s analysis persuasive. It is clear that, when a case is dismissed before it is confirmed, § 1326(a)(2) allows attorney fees and other administrative expenses to be deducted from funds held by the trustee before the balance is returned to the debtor. Even though there is no similar provision in § 1326 or elsewhere in the Code concerning payment of administrative expenses at dismissal after confirmation, the Texas Bankruptcy Court explained in *Lampman*, “[a] technical reading of section 349 and section 1326(a)(2) could lead to the odd conclusion that administrative expenses get paid out of funds on hand upon a voluntary dismissal only if a plan has *not* been confirmed.” *Lampman*, 276 B.R at 184 (comparing § 349(b)(3) with § 1326(a)(2)).


Accordingly, this court finds that, upon dismissal of a chapter 13 case, whether the plan was confirmed or was not confirmed, pursuant to § 1326(a)(2) the trustee must deduct “any unpaid claim allowed under section 503(b)” and must pay the allowed administrative claimants, including counsel for debtors, before any final distribution is made. Pursuant to the court’s Order of Dismissal, all administrative expense applicants who filed a request for payment within 14 days from the date of the Order and whose requests were allowed

(including applications of attorneys entitled to compensation from the chapter 13 estate under § 330(a) for services rendered to the debtor) will be paid before the trustee disburses the remaining funds.

In this case, counsel for debtors asserted that, because the court allowed her attorney fee as an administrative expense under the Order Confirming Chapter 13 Plan, she was not required to file a request for payment of an administrative expense pursuant to the Order dismissing the debtors' case. She criticized the Trustee for continuing to comply with the Confirmation Order by distributing only the monthly payment of attorney fees and argued that the Confirmation Order "had been superceded by a subsequent order, the Order of Dismissal." R. 49 at 2. However, the attorney herself had failed to comply with the subsequent dismissal Order of the court: She did not file a request for payment of an administrative expense now that the case was being dismissed. *See Lampman*, 276 B.R. at 184-85 (holding "that, on motion of the debtor requesting payment of attorney fees previously allowed in a chapter 13 case, the court will order that such fees be deducted from the funds on hand and paid over to the attorney in question"). The attorney's failure to comply with the court's explicit directive to administrative claimants undermines her Objection to the Trustee's Final Report and Account. The court denies counsel's request that the Final Account and Report not be allowed and that the Trustee be ordered to recover the distributed funds and to pay her attorney fee in full before any distribution to creditors.

The court, having given full consideration to the parties' briefs and responses, overrules the Objection to Trustee's Final Report and Account filed by the debtors. The Final Report and Account of the Trustee will be approved by separate order.

SO ORDERED.


HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT